ELMER T. STONECIPHER

IBLA 82-675 Decided March 14, 1983

Appeal from the decision of the Montana State Office, Bureau of Land Management, dismissing protest of rejection of simultaneous oil and gas lease applications. M 54508(ND), M 54510(ND), and M 54546(ND) Acq.

Reversed and remanded.

1. Regulations: Interpretation

   A regulation may not be strictly applied unless it is sufficiently clear so as to preclude any reasonable basis for an oil and gas lease applicant's noncompliance with it.

2. Accounts: Payments -- Oil and Gas Leases: Applications: Drawings -- Oil and Gas Leases: Applications: Filing

   Where a regulation specifies that a filing fee for an oil and gas lease application shall be paid in United States currency, post office or bank money order, bank cashier's check or bank certified check, with the intent to ensure guaranteed remittance, a remittance drawn by a credit union upon a bank is also acceptable where the applicant has provided evidence that payment is guaranteed by a bank.

APPEARANCES: Tilman R. Thomas, Jr., Esq., for appellant; Raymond J. Gengler, Esq., for appellee Sara E. Williams.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Elmer T. Stonecipher has appealed from the March 5, 1982, decision of the Montana State Office, Bureau of Land Management (BLM), dismissing his protest of BLM's rejection of his tendered remittance and applications for oil and gas leases M 54508(ND), M 54510(ND), and M 54546(ND) Acq. Appellant's remittance was in the form of a check drawn by the Government Employees' Credit Union upon Citibank (N.Y.S.), N.A. The Montana State

Office returned appellant's remittance, holding that it did not meet the requirements of 43 CFR 3112.2-2 (1981), which provided: "The filing fee shall be paid in U.S. currency, Post Office or bank money order, bank cashier's check or bank certified check, made payable to the Bureau of Land Management."

Appellant contends 1/ that his remittance complies with requirements of the regulation, since the check is drawn on a bank and the credit union is merely a drawer. Appellant contends that certain provisions of the Depository Institution Deregulation and Monetary Control Act of 1980, 12 U.S.C. §§ 342, 360 (Supp. V, 1981), require that instruments issued by institutions other than banks be given similar treatment. Appellant argues: "In view of these changes in federal law -- which establish and decree parity in the treatment of instruments drawn by or on all depository institutions, it would be grossly unfair for the Bureau of Land Management to refuse to accept, at par, from a consumer (such as Mr. Stonecipher) an instrument which meets a definition of a cashier's check merely because the Bureau has failed to update its regulations to comply with a Congressional mandate."

In support of his contention that the credit union's check constitutes a guaranteed remittance, appellant has submitted a copy of a letter to Patrick J. Mulhern, senior vice president, Citibank, N.A., from H. J. Hintgen, Commissioner, Bureau of the Public Debt, Fiscal Service, Department of the Treasury, authorizing acceptance of CSI remittance service instruments like the one submitted by appellant to pay for securities allotted in Treasury offerings. The letter points to Treasury's requirement that "payment for securities sold on original issue to be made in funds immediately available on the settlement date," stating that "[i]n the case of payments by individual investors for Treasury bills, payment must be made by certified, cashiers, or other bank check." (Emphasis added.) The letter notes: "When the instrument is cleared through the Federal Reserve System, prompt payment is made by Citibank, and this would occur even if the remitted funds have not yet been received." Appellant suggests that because the Department of the Treasury accepts these instruments as satisfying its requirement for payment by certified, cashier's, or other bank check, BLM should do likewise.

Sara E. Williams, whose application was drawn first for oil and gas lease M 54510(ND), has filed an answer to Stonecipher's appeal, contending that a check issued by a credit union cannot be considered a bank check. Noting that a cashier's check is one drawn by a bank upon itself, appellee contends that because the Government Employees' Credit Union drew a check upon Citibank of New York, appellant's check should be treated like a personal check which is not the type of remittance required under the provision of 43 CFR 3112.2-2(a) (1981). Appellee finds nothing in the Depository Institution Deregulation and Monetary Control Act of 1980 requiring this Department to accept instruments such as appellant's. Appellee further contends the letter from the Department of the Treasury is not pertinent to the issues raised before the Board. We agree that this letter does not

1/ Appellant's statement of reasons was filed by counsel for the credit union from whom appellant purchased the instrument which is the subject of this appeal.

govern BLM's practice; nevertheless, we consider it pertinent to the issue of whether the instrument submitted by Stonecipher may be deemed sufficient to guarantee remittance.

[1] Strict application of the regulation in effect at the time appellant filed his application arguably would require rejection of his remittance. However, a regulation may not be strictly applied unless it is sufficiently clear as to preclude a reasonable basis for an applicant's noncompliance with it. See Charles J. Rydzewski, 55 IBLA 373, 88 I.D. 625 (1982). A review of the history of this regulation and its application in previous Departmental adjudications shows it lacks the requisite clarity.

Prior to the promulgation of the regulation requiring that fees be paid by guaranteed remittance, the Department noticed a significant number of checks for application fees had been returned as uncollectible. In an effort to correct this problem, the regulations were revised to require that filing fees be submitted in the form of United States currency, post office or bank money order, bank cashier's check or bank certified check. 45 FR 35164 (May 23, 1980). This change was intended to ensure "guaranteed remittance." Id. at 35159. The BLM did not define these terms, and several administrative appeals made it clear that their meaning was not self-evident. In the absence of definitions, the Board has referred to the criteria for "cashier's check" and "bank money order" set forth in 2 Anderson, Uniform Commercial Code (2d ed. 1971), which defines "cashier's check" as follows:

> A cashier's check is a draft drawn by the bank upon itself which is accepted by the act of issuance. While the only apparent or basic or factual difference between a cashier's check and the ordinary check is that the ordinary check is drawn on one other than the drawer, while in a cashier's check both the drawer and the drawee are the same, there are certain differences. A cashier's check is a primary obligation of the bank, rather than of the depositor as is the case in an ordinary check, and is an obligation to pay which ordinarily cannot be countermanded. It is issued by an authorized officer of a bank, directed to another person, evidencing the fact that the payee is authorized to demand and receive from the bank, upon presentation, the amount of money represented by the check.

Id. at § 3-104:18; see Oxy Petroleum, Inc., 52 IBLA 239 (1981). The Board applied this definition in other cases holding instruments designated "official check" or "teller's check" to be acceptable, reversing BLM's rejection of such instruments. Frank H. Gower, Jr., 53 IBLA 146 (1981); Eva McGee, 55 IBLA 292 (1981).

Appellant Stonecipher's remittance clearly is not a cashier's check. It is not an instrument drawn by a bank upon itself; it was drawn upon a bank by another institution. However, this does not automatically preclude acceptance of Stonecipher's remittance, since the regulation provides for acceptance of instruments other than cashier's checks, such as certain money orders.

Not all money orders are acceptable. In Michaela M. Fitzpatrick, 55 IBLA 108 (1981), the Board held a Travelers Express money order

purchased at a bookstore to be a personal money order and therefore unacceptable. The Board determined "the regulation governing remittances was amended for the specific purpose of eliminating this option. While money orders are acceptable, they must be either post office or bank money orders." Id. at 109. However, in Charles J. Rydzewski, supra, the Board was confronted with the issue whether the regulation precluded acceptance of personal money orders issued by banks. We noted that BLM had attempted by internal memorandum to make a distinction by specifying what type of bank money order is acceptable. In Instruction Memorandum 80-365, change 2 (Nov. 3, 1980), BLM asserted that characteristics of bank money orders are similar to cashier's checks in that they are: Drawn on a bank, issued by the drawee bank, and signed by an authorized bank employee. The instruction memorandum further stated that personal money orders, even if issued by a bank, are not acceptable. The Board noted, however, that the governing regulation was not amended to reflect this clarification. The Board again referred to 2 Anderson, Uniform Commercial Code, supra, which defines a bank money order as:

> [An] instrument issued by an authorized officer of a bank and directed to another, evidencing the fact that the payee may demand and receive upon indorsement and presentation to the bank the amount stated on the face of the instrument; such an instrument is paid from the bank's funds and liability for payment rests solely on the issuing bank.

Id. at § 3-104:20. We noted that unlike the instrument described in the definition, the bank personal money order was signed by Rydzewski, not the bank, and that the blanks for the name of the payee, the date, and the address of the drawer had been completed in Rydzewski's handwriting. The Board also recognized that a personal money order issued by a bank is similar to a personal check to the extent that payment may be stopped anytime prior to acceptance by the drawee bank, thus indicating that bank personal money orders were not sufficient to fulfill the purpose of the regulation of assuring "guaranteed remittance." Notwithstanding the fact that Rydzewski's remittance did not meet the criteria set forth in the above-quoted definition and failed to serve the purpose of the regulation, the Board held it acceptable, since the regulation itself did not specify what types of money orders issued by banks would be acceptable. The Board did not consider the regulation to be sufficiently clear as to provide no reasonable basis for the applicant's noncompliance with it.

In Ellis R. Ferguson, 69 IBLA 352 (1982), the Board again was asked to consider whether a Travelers Express personal money order would comply with the regulation. Meanwhile, BLM had amended its instructions to make no distinction between payment instruments submitted by commercial banks and savings and loan associations, based upon the determination that money orders issued by savings and loan institutions are the equivalent of and offer the same guarantees as those issued by commercial banks. Instruction Memorandum 80-635, Change 3 (Aug. 3, 1981). Because Ferguson purchased his money order from a savings and loan association, he contended that it should have been accepted. The majority opinion affirmed BLM's refusal of Ferguson's remittance, because Ferguson had failed to provide sufficient information to

describe the duties and liabilities of the involved financial institutions with respect to the money order at issue, and the available information indicated that no bank was obligated to make payment. Id. at 354. The concurring opinion by Administrative Judge Grant, author of the Rydzewski opinion, offered the following description of the instrument in support of his conclusion that it was not a bank money order:

> [A]ppellant has not established that the instrument at issue in this case is a bank personal money order. It appears that First Federal sold the draft as the agent of Travelers Express Company. The proceeds of the sale of the money order were held for the account of Travelers Express Company, on whose behalf the savings and loan acted in selling the money order. Purchase of the money order was not a purchase of the credit of the bank. No funds have been paid to a bank upon which the money order is drawn to insure the existence of assets sufficient to honor the money order when presented. The instrument was neither drawn by or on a bank. An instrument which states that it is "payable through" a bank designates that bank as a collecting bank to make presentment but does not authorize the bank to pay the instrument. 2 Anderson, Uniform Commercial Code, § 3-120:1 (2d ed. 1971). The bank is not named as drawee and is neither ordered nor authorized to pay the instrument from the drawer's account or other funds of the drawer in its hands. Id. Accordingly, the instrument at issue in this case is clearly neither a bank money order nor a bank personal money order. Rather, the instrument was a money order sold by an agent of Travelers Express Company. Payment of the money order is contingent upon whether Travelers Express Company is willing or able to honor the instrument. Thus, the instrument was properly rejected by BLM.

Id. at 356. The combined effect of the Rydzewski and Ferguson decisions makes this prepaid remittance drawn upon Citibank acceptable under 43 CFR 3112.2-2 (1981).

Long before the Board issued the Ferguson decision, BLM recognized that the confusion resulting from efforts to apply this regulation delayed issuance of numerous leases, and amended the regulation to read: "[E]ach filing shall be accompanied by a $75 filing fee." The form of remittance was specified in 43 CFR 3103.1-1: "All remittances shall be by U.S. currency, postal money order or negotiable instrument payable in United States currency." 47 FR 8545 (Feb. 26, 1982). At 47 FR 8544 (Feb. 26, 1982) BLM explained its reason for doing this:

> This final interim rulemaking eliminates the requirement that simultaneous oil and gas lease application filing fees be paid by guaranteed remittance. This requirement has caused significant confusion to the public and the Bureau of Land Management as to what constitutes a guaranteed remittance, has resulted in a number of administrative appeals and has burdened the public out of proportion to the problem of bad checks that it was designed to address. In the future, the Bureau will use normal collection procedures for uncollected remittances instead of requiring all applicants to use particular forms of remittances.

[2] In Ellis K. Ferguson, supra at 335 n.3., we held the amended regulation could not be applied because doing so would prejudice those applicants whose applications were drawn with first priority. This ruling was based on the well settled rule that the Department may only apply an amended regulation in a way that benefits an applicant for an oil and gas lease in the absence of intervening rights of third parties or prejudice to the interest of the United States. Although we are required to apply the regulation in effect when appellant's application was filed, the Board's previous decisions preclude us from applying the regulation strictly. No decision by this Board has construed this regulation more narrowly than necessary to assure guaranteed remittance. On the contrary, in Rydzewski we approved the acceptance of bank personal money orders, notwithstanding that such orders would not provide guaranteed remittance. The instrument in Ferguson was rejected because appellant provided no evidence that payment was guaranteed by a bank. In the instant case, however, appellant has provided evidence that payment is guaranteed by a bank. Accordingly, under these circumstances, we are constrained to conclude that BLM's refusal to accept appellant's remittance was improper.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded for further action consistent with this opinion.

Franklin D. Arness
Administrative Judge
Alternate Member

We concur:

Douglas E. Henriques
Administrative Judge